No. 85-1626

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CHARLES GOODMAN, RAMON L. MIDDLETON, ROMULUS C. JONES, JR., LYMAS L. WINFIELD, and UNITED POLITICAL ACTION COMMITTEE OF CHESTER COUNTY, DAVID DANTZLER, JR., JOHN R. HICKS, III, DOCK L. MEEKS, individually and on behalf of others similarly situated,
Petitioners,

v.

LUKENS STEEL COMPANY, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC), LOCAL 1165, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC) AND LOCAL 2295, UNITED STEELWORKERS OF AMERICA (AFL-CIO-CLC),
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AND THE WOMEN'S LEGAL DEFENSE FUND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

HAROLD R. TYLER
JAMES ROBERTSON
NORMAN REDLICH
Trustees
WILLIAM L. ROBINSON
JUDITH A. WINSTON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

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ROBERT F. MULLEN
Counsel of Record

STACEY E. ELIAS
IVAN F. BLEJEC
BROOKS R. BURDETTE
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
57th Floor
New York, N.Y. 10005
(212) 422-3000

Attorneys for Amici Curiae

Counsel continued on inside cover

GROVER G. HANKINS
JOYCE H. KNOX
NATIONAL ASSOCIATION
FOR THE ADVANCEMENT
OF COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, Maryland 21215
(301) 358-8900

ANTONIA HERNANDEZ
E. RICHARD LARSON
THERESA BUSTILLOS
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, California 90014
(213) 629-2512

JOAN BERTIN
JOAN GIBBS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

JUDITH L. LICHTMAN
CLAUDIA WITHERS
WOMEN'S LEGAL DEFENSE FUND
2000 P Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-0364

Attorneys for Amici Curiae

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CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief and their letters of consent are being filed separately herewith.

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nationwide civil rights organization that was formed in 1963 by leaders of the American Bar, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. The national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, equalization of municipal services and school desegregation. Over one thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association and other leading lawyers, have assisted the Lawyers' Committee in such efforts.

The National Association for the Advancement of Colored People is a New York nonprofit membership corporation. Its principal aims and objectives include promoting equality of rights and eradicating caste or race prejudice among the citizens of the United States and securing for them increased opportunities for employment according to their ability.

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by the Constitution and the laws of the United States.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principal object is to secure through litigation and education the civil rights of Hispanics living in the United States.

The Women's Legal Defense Fund ("WLDF") is a nonprofit organization founded in 1971 to advance women's rights. It represents women in employment discrimination litigation, operates an employment discrimination counseling program, conducts public education and represents women's interests before the Equal Employment Opportunity Commission and other federal agencies. A major priority for WLDF is its Employment Rights Project for Women of Color.

Amici have a direct interest in the law governing the construction and application of the civil rights statutes. Amici and those individuals whom amici represent litigate under these statutes regularly and thus have a strong incentive to prevent diminution of the statutes' power as sources of redress for civil rights violations.

STATEMENT OF THE CASE

Amici Curiae incorporate the Statement of the Case submitted by petitioners herein.

SUMMARY OF ARGUMENT

This Court's decision in *Wilson v. Garcia* does not require the application of personal injury statutes of limitations to 42 U.S.C. § 1981 claims. *Wilson* held only that personal injury statutes of limitations are to be applied to claims under 42 U.S.C. § 1983. *Wilson* was based on this Court's review of the legislative history of Section 1983, the extensive and continuous litigation over the choice of the appropriate state limitations statute most analogous to the particular Section 1983 issues at bar and the need to avoid uncertainty and extra litigation.

Section 1981 differs from Section 1983. Unlike Section 1983, which was concerned primarily with personal injuries, Section 1981 "relates primarily to racial discrimination in the making and enforcement of contracts". *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975). Furthermore,

while Section 1983 embraces a vast array of claims, Section 1981 is almost always invoked to redress economic injury. The choice of the state period of limitations to follow for Section 1981 claims is now settled in most jurisdictions, and there is no adequate reason to disturb settled expectations concerning that limitations period.

Policy considerations also lead to the conclusion that Section 1981 claims should be governed by statutes of limitations for economic injuries. Limitations periods applicable to economic injury are usually longer than periods applicable to personal injury because of the availability of records and, consequently, the lesser reliance on memory to prove facts in dispute. This judgment of various state legislatures applies equally to cases under Section 1981 and to other economic injury cases arising under state law, and there is no reason to disfavor Section 1981 claims by singling them out as an exception to these state legislative judgments.

Even if *Wilson* does require applying personal injury statutes of limitations to Section 1981 claims, it should not apply retroactively. Under the test announced by this Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), nonretroactivity is mandated. The circuit court precedent that existed when this case was filed pointed toward application of Pennsylvania's six-year statute of limitations for contract claims and other claims not involving personal injuries, libel or slander. Nothing foreshadowed the *Wilson* decision. Retroactive application of *Wilson* would void the thirteen years of discovery and proceedings and the thirty-two days of trial required to litigate this case. Finally, retroactive application of *Wilson* to Section 1981 actions generally would wreak havoc in a large number of pending cases: they have been and are being litigated under settled limitations periods, and vast additional efforts would be required if all such cases—from the most mature to the more recently filed—were suddenly required to conform to a new limitations period.

ARGUMENT

I. THE THIRD CIRCUIT ERRONEOUSLY APPLIED PENNSYLVANIA'S TWO-YEAR PERSONAL INJURY STATUTE TO PETITIONERS' SECTION 1981 EMPLOYMENT DISCRIMINATION CLAIMS.

Even before the enactment of 42 U.S.C. § 1988 (1982) ("Section 1988")[1] the long-standing rule had been that the limitations period applicable to a federal claim for which no statute of limitations is specified shall be the period for the most analogous state cause of action. *See Wilson v. Garcia,* 471 U.S. 261, 280-81 (1985) (O'Connor, J., dissenting) (citing *M'Cluny v. Silliman,* 28 U.S. (3 Pet.) 270 (1830)). Section 1988 has been interpreted as embodying that principle. *See Board of Regents v. Tomanio,* 446 U.S. 478, 483-86 (1980). In applying the borrowing principle to claims brought under 42 U.S.C. § 1981 (1982) ("Section 1981")[2] prior to *Wilson,* the Third Circuit had adopted the Pennsylvania statute of limitations applicable to causes of action sounding in contract or other economic injury. *See Davis v. United States Steel Supply,* 581 F.2d 335 (3d Cir. 1978), *cert. denied,* 460 U.S. 1014 (1983); *Meyers v. Pennypack Woods Home Ownership Ass'n,* 559 F.2d 894 (3d Cir. 1977).

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[1] Section 1988 provides in relevant part:

"The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

[2] Section 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The Third Circuit, by now requiring the application of the personal injury statute of limitations to all Section 1981 claims, departs from clear precedent in two ways. First, it incorrectly relies on *Wilson* to change the established application of Section 1988. *Wilson* simply carved out an exception to the usual practice of analogizing individual claims. It did so with respect to claims brought under 42 U.S.C. § 1983 (1982) ("Section 1983")[3] and spoke to no other civil rights statute. Second, even if *Wilson* mandates a uniform characterization of Section 1981 claims, the Third Circuit erroneously characterized the statute as one for redress of personal rather than economic injury.

A. Section 1981 Was Enacted to Redress Injuries to Economic Interests.

Section 1981 "relates primarily to racial discrimination in the making and enforcement of contracts". *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975). Employment discrimination claims of the type alleged by petitioners arise from the right to enter into and enforce contracts and from individuals' desires to protect their economic interests. The District Court in this case correctly applied Pennsylvania's six-year statute for economic and contract injuries to petitioners' Section 1981 claims.

Section 1981 was enacted originally as Section One of the Civil Rights Act of 1866.[4] Its purpose was to guarantee to all persons the full rights of citizenship. The specific evils that the Act sought to eliminate were embodied in the so-called "black

[3] Section 1983 provides in relevant part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[4] It was re-enacted, with minor changes, as Section 16 of the 1870 Act, and was later made part of the 1874 recodification. *See Runyon v. McCrary*, 427 U.S. 160, 168-69 n.8 (1976).

codes" enacted in the majority of the Southern states by early 1866. *See* 6 C. Fairman, *History of the Supreme Court of the United States, Reconstruction and Reunion,* pt. 1 at 106-07 (1971) (Table of Presidential and Congressional Reconstruction). The codes were intended to reduce black Americans to a life of perpetual economic subservience to their former masters.[5] The magnitude of the problem was put into focus by General Carl Schurz, who brought to light the methods by which the Southern states sought to deprive the newly freed blacks of their economic rights:

> " 'It is, indeed, not probable that a general attempt will be made to restore slavery in its old form, on account of the barriers which such an attempt will find in its way; but there are systems intermediate between slavery as it formerly existed in the south, and free labor as it exists in the north, but more nearly related to the former than to the latter, the introduction of which will be attempted.' "

Goodman v. Lukens Steel Co., 777 F.2d 113, 133 (3d Cir. 1985) (Garth, J., dissenting) (quoting Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 21 (1865)), *cert. granted,* 107 S. Ct. 568 (1986). When the immediate purpose and effect of the codes became apparent, Congress began to consider how to preserve and protect the rights of blacks.[6]

[5] *See* Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 25 (1865) ("The opposition to the negro's controlling his own labor, carrying on business independently on his own account—in one word, working for his own benefit—showed itself in a variety of ways.").

The following is an example of a typical provision of the black codes:

"No Negro or freedman shall reside within the limits of the town of Opelousas [Louisiana] who is not in the regular service of some white person or former owner, who shall be responsible for the conduct of said freedman. But said employer or former owner may permit said freedman to hire his time, by special permission in writing, which permission shall not extend over twenty-four hours at any one time. Any one violating the provisions of this section shall be imprisoned and forced to work for two days on the public streets."

Cong. Globe, 39th Cong., 1st Sess. 517 (1866).

[6] *See generally* Cong. Globe, 39th Cong., 1st Sess. 39-42 (1865). Approximately one month prior to the introduction of what later became Section 1981, Senator Trumbull, who would later introduce the bill, warned that:

Within a month after the ratification of the Thirteenth Amendment, Senator Trumbull introduced a bill, later to become Section 1981, which would insure that blacks would "have the same right to make and enforce contracts". Cong. Globe, 39th Cong., 1st Sess. 211 (1866). The debates over the bill evidenced that its purpose was to protect the rights of the recently freed slaves to engage in businesses, to enter into and enforce contracts, to obtain work, and if they chose, to leave their work.

The history of 42 U.S.C. § 1982 (1982) ("Section 1982"),[7] underpins the distinctions between Section 1981 and Section 1983. Section 1981 and Section 1982 were both originally part of Section One of the Civil Rights Act of 1866. *See Runyon v. McCrary,* 427 U.S. 160, 168-70 (1976). Section 1982, in plain and unambiguous terms, grants to all persons the identical right to purchase and lease real property. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 420 (1968). By its very terms, the only plausible construction of Section 1982 ("purchase, lease, sell, hold, and convey") is that it provides protection for property-based economic rights. A limitations period for personal injuries has no place in a congruent statutory framework dealing with the protection of property, contract and economic rights.

The legislative history of Section 1981 and Section 1982 establishes that the conditions surrounding the adoption of the Civil Rights Act of 1866, as well as the substantive rights it was

"[I]f the information from the South be that the men whose liberties are secured by [the Thirteenth Amendment] are deprived of the privilege to go and come when they please, to buy and sell when they please, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights: they would not be freemen without them. It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights."

Cong. Globe, 39th Cong., 1st Sess. 43 (1865).

[7] Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

framed to protect, are entirely distinct from those of Section 1983.[8] This Court itself, when interpreting these distinct provisions, has noted that "it has long been recognized that '[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources' ". *District of Columbia v. Carter,* 409 U.S. 418, 423 (1973) (quoting *Monroe v. Pape,* 375 U.S. 167, 205-06 (1961) (Frankfurter, J., dissenting)).[9]

Section 1983, originally known as the Ku Klux Klan Act, was enacted as part of the Civil Rights Act of 1871. The Act was a reaction to "the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights". *Wilson,* 471 U.S. at 276.[10] The legislative history, addressed extensively by this

[8] In light of their common origin, Section 1981 and Section 1982 should be construed to effectuate their common purpose. *See Runyon v. McCrary,* 427 U.S. at 170-71 ("a Negro's § 1 right to purchase property on equal terms with whites [is] violated when a private person refuse[s] to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to 'make and enforce contracts' is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees"); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.,* 410 U.S. 431, 440 (1973) (this court relied upon the "historical interrelationship" of Section 1981 and Section 1982 to construe and apply those statutes similarly). Section 1983, however, has a different origin and should be construed differently.

[9] In *Carter,* this Court was comparing legislative enactments enforcing the Thirteenth Amendment with those enforcing the Fourteenth Amendment. *See* 409 U.S. at 423.

[10] The Congressional debates surrounding Section 1983 leave no doubt as to the particular evil that section was intended to remedy:

"The whole South . . . is rapidly drifting into a state of anarchy and bloodshed, which renders the worst government on the face of the earth respectable by comparison. There is no security for life, person or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals."

Cong. Globe, 42d Cong., 1st Sess. 321 (1871).

"[T]he Ku Klux Klan system is ingeniously devised for the express purpose of enabling a few bad men to intimidate the masses of the people, to avoid any conflict with the military power, and to control the State courts and local authorities by perjury and fraud.

"It is an extraordinary combination to commit crime, and requires extraordinary legislation for its suppression."

Id. at 321-22.

Court in *Wilson,* demonstrates that Congress was trying to stop the murders, lynchings and whippings carried out by lawless Southerners and to eliminate the "refuge that local authorities extended to the authors of these outrageous incidents". *Id.* The legislative history makes clear that *Wilson's* analogy, which likened Section 1983 claims to personal injury actions, has no logical or historical nexus to claims brought under Section 1981.

B. The Rationales of *Wilson* Do Not Apply to Section 1981.

This Court's decision in *Wilson* was premised upon the idea that case-by-case determination of the appropriate limitations period had bred "uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983". 471 U.S. at 272. *Wilson* made clear, however, that it is the peculiar characteristics of Section 1983 which provoke uncertainty. Of particular interest to this Court was the breadth of application Section 1983 has developed since its enactment. *See id.* at 275 ("it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace").

Application of Section 1981 is ultimately limited by the narrow spectrum of rights created within the language of the statute. As noted above, the rights created center upon an individual's economic and contractual interests. Of Section 1983, however, this Court noted that "[t]he high purposes of this unique remedy make it appropriate to accord the statute 'a sweep as broad as its language.'" *Id.* at 272 (quoting *United States v. Price,* 383 U.S. 787, 801 (1966)).[11]

Section 1981 is not a remedy with a potentially infinite number of applications. Moreover, by the time this Court decided *Wilson,* many jurisdictions had already adopted a single statute of limitations applicable to all Section 1981

[11] This Court was particularly concerned, in view of the numerous and diverse claims which could be brought under Section 1983, ranging from "a challenge to unequal age limitations for males and females on the sale of beer" to "the right to marry the person of one's choice", that two or more periods could be applied to each Section 1983 case. *Wilson,* 471 U.S. at 273-74.

claims.[12] In those jurisdictions there is no uncertainty, confusion or inconsistency with respect to the issue.

In choosing the appropriate state analogy for Section 1981 claims courts have merely followed the time worn procedure they have always used whenever a federal statute has no limitations period. Although multiple limitations periods may be applicable to claims premised upon federal statutes, courts have been able, for over a century and a half, to determine and apply the most analogous limitations period. *See Wilson,* 471 U.S. at 280-81 (O'Connor, J., dissenting). The courts have not sought to apply a uniform characterization to the federal claims for which they are required to borrow state statutes of limitations. For example, under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), courts apply the limitations period that will best effectuate the underlying federal interest, which often results in the adoption of different limitations periods.[13]

[12] *See, e.g., Breland v. Board of Educ.,* 729 F.2d 360, 361-62 (5th Cir. 1984) (Mississippi applies single limitations period to all claims arising after enactment of statute of limitations in 1976); *Davis v. Sears, Roebuck & Co.,* 708 F.2d 862, 865 (1st Cir. 1983) (Massachusetts); *Perez v. Laredo Junior College,* 706 F.2d 731, 733 n.1 (5th Cir. 1983) (Texas), *cert. denied,* 464 U.S. 1042 (1984); *Simmons v. South Carolina State Ports Auth.,* 694 F.2d 63, 64 (4th Cir. 1982) (South Carolina); *Bratten v. Bethlehem Steel Corp.,* 649 F.2d 658, 663-64 (9th Cir. 1980) (California); *Movement for Opportunity and Equality v. General Motors Corp.,* 622 F.2d 1235, 1244 (7th Cir. 1980) (Indiana); *Tyler v. Reynolds Metal Co.,* 600 F.2d 232, 234 (9th Cir. 1979) (per curiam) (Arizona); *Keyse v. California Texas Oil Corp.,* 590 F.2d 45, 47 (2d Cir. 1978) (New York); *Tatum v. Golden,* 570 F.2d 753, 754 (8th Cir.) (Iowa), *cert. denied,* 436 U.S. 960 (1978); *Beard v. Robinson,* 563 F.2d 331, 338 (7th Cir. 1977) (Illinois), *cert. denied sub nom. Mitchell v. Beard,* 438 U.S. 907 (1978); *Chambers v. Omaha Pub. School Dist.,* 536 F.2d 222, 228 (8th Cir. 1976) (Nebraska); *Patterson v. American Tobacco Co.,* 535 F.2d 257, 275 (4th Cir.) (Virginia), *cert. denied,* 429 U.S. 920 (1976); *Mason v. Owens-Illinois, Inc.,* 517 F.2d 520, 522 (6th Cir. 1975) (Ohio); *cf. Martin v. Georgia-Pacific Corp.,* 568 F.2d 58, 62-63 (8th Cir. 1977) (Arkansas adopts one of two statutes depending upon whether claim is for breach of collective bargaining agreement).

[13] *See,* e.g., *Forrestal Village, Inc. v. Graham,* 551 F.2d 411, 413 (D.C. Cir. 1977) (local blue sky law "best effects federal policy"); *LaRosa Bldg. Corp. v. Equitable Life Assurance Soc'y of the United States,* 542 F.2d 990, 993 (7th Cir. 1976) (state securities limitations period applied); *Douglass v. Glenn E. Hinton Invs., Inc.,* 440 F.2d 912, 915-16 (9th Cir. 1971) (policy of protecting federal plaintiff's right to sue mandated use of three-year fraud period); *Vanderboom v. Sexton,* 422 F.2d 1233, 1240 (8th Cir.) (adopted

Under the Labor Management Relations Act, 29 U.S.C. §§ 141-188 (1982), courts have considered several factors in deciding what is the most appropriate limitations period, and in doing so have applied both contract and tort statutes of limitations.[14] Furthermore, in *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), this Court declined to establish a uniform period for claims under Section 301 of the Act. Despite substantial divisions among federal courts in their choice of limitations periods governing claims arising under the Act, this Court refused to engage in "so bald a form of judicial innovation" as devising a uniform federal period of limitations. *Id.*, 383 U.S. at 701.

Different limitations periods have always been applied under other civil rights statutes, depending on the nature of the claim. For example, where claims involved property rights of citizens[15] or consipiracy to interfere with civil rights[16] courts have sought to apply the most analogous state statute of

local two-year securities period), *cert. denied*, 400 U.S. 852 (1970); *Charney v. Thomas*, 372 F.2d 97, 100 (6th Cir. 1967) (applied a fraud analogy because local blue sky law was dissimilar to federal securities law).

[14] *See, e.g., Sandobal v. Armour and Co.*, 429 F.2d 249, 257 (8th Cir. 1970) (written contract period most analogous to claim under § 301); *Howard v. Aluminum Workers Int'l Union & Local 400*, 589 F.2d 771, 773-74 (4th Cir. 1978) (adopted tort analogy for § 9 and personal injury analogy for § 101); *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 287 (1st Cir.) (applied one-year tort period), *cert. denied sub nom. Puerto Rico Tel. Co. v. De Arroyo*, 400 U.S. 887 (1970).

[15] *See, e.g., Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d at 903 (six-year period applicable to actions on debt, contract and personal injury applied to Section 1982 claim); *Baker v. F & F Inv.*, 420 F.2d 1191, 1198 (7th Cir.) (five-year catch-all period applied to Section 1982 claim), *cert. denied*, 400 U.S. 821 (1970).

[16] *See, e.g., Peterson v. Fink*, 515 F.2d 815, 816 (8th Cir. 1975) (three-year period for unlawful conduct of public officers held analogous to Section 1985 claim); *Crosswhite v. Brown*, 424 F.2d 495, 496 n.2 (10th Cir. 1970) (two-year period for injury to the rights of another not arising from a contract applied to Section 1985 claims); *McGuire v. Baker*, 421 F.2d 895, 898-99 (5th Cir.) (two-year period for action on a debt applied to Section 1985 claim), *cert. denied*, 400 U.S. 820 (1970); *Wakat v. Harlib*, 253 F.2d 59, 63 (7th Cir. 1958) (five-year general period applied to Section 1985 claim).

limitations without attempting to develop a uniform characterization.

There are many different federal statutes, covering many different kinds of federal claims, which require borrowing state limitations periods. That there should be a uniform characterization of Section 1983 claims for the reasons stated by this Court in *Wilson* does not mean that there should be a uniform characterization of all other federal claims, and it surely does not mean that all other federal claims should be considered personal injury claims.

II. APPLICATION OF A CONTRACT OR ECONOMIC INJURY STATUTE OF LIMITATIONS TO A SECTION 1981 CLAIM IS CONSISTENT WITH JUDICIAL POLICIES OF REPOSE AND CONGRESSIONAL POLICY TO GRANT BROAD REMEDIAL RELIEF TO CIVIL RIGHTS PLAINTIFFS.

The purpose of Section 1981, as well as the other civil rights statutes, is "to ensure that individuals whose federal Constitutional or statutory rights are abridged may recover damages or secure injunctive relief". *Burnett v. Grattan*, 468 U.S. 42, 55 (1984). With respect to the statute of limitations, "the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones". *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 463-64.

Application of the state limitations period governing claims sounding in contract and other economic injury would promote both federal policy underlying Section 1981 and state concerns found in the doctrine of repose.

As a general rule state statutes of limitations applicable to contract actions are longer than those applicable to personal injury actions and, thus, would give the civil rights plaintiff the additional time necessary to overcome the numerous obstacles inherent in a Section 1981 employment discrimination claim.

Moreover, the length of a limitations period reflects a state legislature's assessment of the relative importance of the underlying state claims, the need for repose for potential defendants and considerations of judicial or administrative economy. *Burnett v. Grattan*, 468 U.S. at 52-53; *see Wilson*, 471 U.S. at 282 (O'Connor, J., dissenting) (statute of limitations based upon realistic life-expectancy of evidence and adversary's reasonable expectations of repose).

Personal injury actions tend to be based upon a singular event, often occurring in dramatic—even traumatic—circumstances. Evidence usually consists of eye-witness testimony. By contrast, contract or other economic injury actions often involve an extended relationship between the parties. The claim is largely proven by the existence or non-existence of documents, the occurrence or nonoccurrence of a specific event. Such evidence has a greater life-expectancy and can accommodate a longer limitations period.

The same distinctions have been noted between Section 1981 and Section 1983:

> "[A]t least with respect to the statute of limitations question, § 1981 cases are properly distinguished from § 1983 cases. For example, § 1983 actions have typically involved tort claims arising from personal injury, in many cases involving physical conduct of an irregular or sudden nature. By contrast, claims made pursuant to § 1981 usually arise out of employment contract relationships which consist of more patterned-type behavior, frequently involving documentary proof in the form of employment records. Accordingly, the passage of time is less likely to impede the proof of facts in a § 1981, than in a § 1983, case and a longer statute of limitations under § 1981 is, therefore, more appropriate."

Dudley v. Textron, Inc., Burkart-Randall Div., 386 F. Supp. 602, 606 (E.D. Pa. 1975); *see also Dupree v. Hertz Corp.*, 419 F. Supp. 764, 767 (E.D. Pa. 1976) ("the passage of time is not as likely to interfere with the proof of an employment discrimination case as it would affect the memories of witnesses in a personal injury action").

III. THE THIRD CIRCUIT ERRED BY APPLYING *WILSON V. GARCIA* RETROACTIVELY TO THE INSTANT CASE.

Even if the Third Circuit was right in holding that *Wilson* mandates applying personal injury statutes of limitations to Section 1981 claims, it was wrong in applying that rule retroactively to the instant case. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court set out three factors that determine whether a decision should be given retroactive effect.[17] Here, all three factors militate against retroactivity.

The first *Chevron* factor requires the court to determine whether "the decision to be applied nonretroactively . . . establish[es] a new principle of law". 404 U.S. at 106. It can do so "either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* In the instant case, the Third Circuit erred by denying nonretroactivity to petitioners on the basis of its finding that their causes of action arose before clear contrary precedent was established. This finding was erroneous. Furthermore, no precedent existed "clearly foreshadowing" the 1985 *Wilson* decision.

Under the second *Chevron* factor, a Court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 106-07. The Third Circuit's rule would retard the purposes of *Wilson* by (1) retroactively denying relief for otherwise valid Section 1981 claims on technical grounds and thus converting

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[17] This Court recently noted that "the area of civil retroactivity . . . continues to be governed by the standard announced in *Chevron Oil Co. v. Huson*". *Griffith v. Kentucky*, 55 U.S.L.W. 4089, 4091 n.8 (U.S. Jan. 13, 1987).

efforts expended on litigation into wastes of resources, (2) creating additional litigation and (3) increasing uncertainty.

The third *Chevron* factor "weigh[s] the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity' ". 404 U.S. at 107 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)). The equities weigh in favor of nonretroactivity because (1) petitioners had no reason to foresee *Wilson*, (2) their claims have been extensively litigated and (3) they should not now be forced to relitigate their case under new rules.

More generally, all *Chevron* factors favor nonretroactive application of *Wilson* to pending Section 1981 cases, in many of which amici are directly involved. With the limitations period generally settled for those cases, everything done in them—from the pleadings, to class definition and certification, to the nature and scope of discovery and to the trials themselves—is threatened by retroactive application of *Wilson*. Injunctive relief already obtained may be subject to relitigation if a new limitations period is applied retroactively. The resultant turmoil would be completely at odds with *Wilson's* stated purpose of reducing litigation, and would tend unfairly to defeat legitimate expectations of litigants.

A. The Third Circuit Erroneously Found that *Wilson* Did Not Establish a "New Principle of Law".

Under the first *Chevron* factor a "new principle of law" has been established if the decision to be applied *either* (1) "overrul[es] clear past precedent on which litigants may have relied" *or* (2) "decid[es] an issue of first impression whose resolution was not clearly foreshadowed". 404 U.S. at 106. The Court of Appeals below misapplied the "clear past precedent" test and ignored the "not clearly foreshadowed" test.

The Third Circuit based its conclusion that *Wilson* should apply retroactively on its finding that the precedent became

"clear" too late. *Goodman*, 777 F.2d at 120 (incorporating by reference its holding in *Smith v. City of Pittsburgh*, 764 F.2d 188, 194-95 (3d Cir.), *cert. denied*, 106 S. Ct. 349 (1985)). A Third Circuit case decided after the instant case confirms that *Wilson* was applied retroactively to the petitioners because, according to the court, the law did not become "clear" until the Third Circuit itself held Pennsylvania's six-year contract statute of limitations applicable to Section 1981 claims in *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977). *See Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 512 (3d Cir.), *cert. granted*, 107 S. Ct. 62 (1986).[18]

1. *The Third Circuit misapplied the "clear past precedent" test of the first* ***Chevron*** *factor.*

The Third Circuit was too narrow in its definition of clear past precedent.[19] Insisting upon a controlling circuit court opinion directly on point is unrealistic and unnecessarily exacting. The instant case is a good example of the way in which the law can give clear indications of its direction before the culmination of the jurisprudential process in a "clear" controlling circuit court decision. At the time that petitioners'

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[18] In *Saint Francis*, the court explained:

"The cause of action that was the basis for the *Goodman* case arose in May, 1970. *Goodman*, 777 F.2d at 121 n.4. The conclusion that *Goodman* is to be retroactively applied to the plaintiff in *Goodman* itself does not mandate that *Goodman* be retroactively applied to this plaintiff. The crucial distinction between the situation in *Goodman* and that involved here is the relative clarity of this Circuit's law regarding the proper limitations period. In 1970, that law was not clear."

784 F.2d 505, 512 n.9 (3d Cir. 1986).

[19] There is no doubt that in cases where there was clear precedent contrary to *Wilson* at the time the shorter period expired, *Wilson* does not apply retroactively. *See Bradshaw v. General Motors Corp., Fisher Body Div.*, 805 F.2d 110, 112 (3d Cir. 1986); *Ridgway v. Wapello County, Iowa*, 795 F.2d 646, 647 (8th Cir. 1986); *Jones v. Bechtel*, 788 F.2d 571, 574 (9th Cir. 1986); *Anton v. Lehpamer*, 787 F.2d 1141, 1146 n.7 (7th Cir. 1986); *Al-Khazraji v. Saint Francis College*, 784 F.2d at 512-14; *Jackson v. City of Bloomfield*, 731 F.2d 652, 653-55 (10th Cir. 1984) (nonretroactive application of *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984) (en banc)). *But see Carroll v. Wilkerson*, 782 F.2d 44 (6th Cir.), *cert. denied sub nom. County of Wayne v. Carroll*, 107 S. Ct. 330 (1986); *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1378 (1986).

claims arose in May 1970, it was clearly established in the Third Circuit that:

> "Since the Civil Rights Act contains no provision limiting the time within which an action thereunder may be brought, the applicable Statute of Limitations is that which the State would enforce had the action seeking similar relief been brought in State Court."

Henig v. Odorioso, 385 F.2d 491, 493 (3d Cir. 1967), *cert. denied,* 390 U.S. 1016 (1968) (citing *Swan v. Board of Higher Educ.,* 319 F.2d 56 (2d Cir. 1963); *Smith v. Cremins,* 308 F.2d 187 (9th Cir. 1962); *Mohler v. Miller,* 235 F.2d 153 (6th Cir. 1956)).[20] From 1970, when this cause of action arose, until 1973, when suit was filed, the only precedent that existed in any circuit court pointed toward the applicability of the six-year statute of limitations.[21]

When this action was commenced, there was only one case in all of the Third Circuit characterizing a Section 1981 claim for purposes of selecting the applicable statute of limitations. The case, *Page v. Curtiss-Wright Corp.,* 332 F. Supp. 1060 (D.N.J. 1971), was decided some six months before the two year period now being urged upon the petitioners expired. *Page* was a Section 1981 claim alleging, among other things, that the company had discriminated against its black employees and that the union had "acquiesced and joined in unlawful and discriminatory practices of the company, and failed to protect

[20] *Henig* was a Section 1983 case construing the principles of Section 1988 and, therefore, is adaptable to Section 1981 analysis.

[21] Pennsylvania's limitations scheme consisted of a two-year statute for "injuries to the person not resulting in death", a one-year statute for libel and slander and a six-year statute for virtually everything else. Pennsylvania's Act of March 12, 1713, 12 P.S. § 31, provided for a six-year statute for virtually all actions, including actions for breach of contract and for trespass. *See Meyers v. Pennypack Woods Home Ownership Ass'n,* 559 F.2d at 902. The Act of April 25, 1850, 12 P.S. § 32, created a one-year exception to the general six-year rule for libel and slander actions. *See id.* at 902 n.23. The Act of June 24, 1895, 12 P.S. § 34, carved out a two-year exception for injury to the person not resulting in death. *See Walker v. Mummert,* 394 Pa. 146, 146 A.2d 289, 290 (1958); *Rodenbaugh v. Philadelphia Traction Co.,* 190 Pa. 358, 42 A. 953, 954 (1899).

blacks from such discrimination". 352 F. Supp. at 1063. The *Page* court applied the New Jersey six-year contract statute of limitations. *See id.* at 1065.[22]

2. *The Third Circuit ignored* ***Chevron's*** *"not clearly foreshadowed" test, which mandates nonretroactivity in the instant case.*

The Third Circuit resolved *Chevron's* " clear past precedent" test in a way that directly implicates the "not clearly foreshadowed" test and thus mandates nonretroactive treatment of *Wilson.* If the Third Circuit is right and there was not sufficiently clear precedent prior to 1977, then the question under *Chevron* of which statute of limitations applied to the instant case was necessarily "an issue of first impression whose resolution was not clearly foreshadowed".

There was certainly no precedent clearly foreshadowing the 1985 *Wilson* decision in 1973 when this action was commenced. No one has suggested that there was. Indeed, the Third Circuit's opinion in *Goodman* states that:

> "Although the district judge was correct in forecasting that we would adopt a six year limitation period in an employment case, his prescience, like ours, was limited.

[22] The law in other circuits when this action was commenced provided authority only for classifying Section 1981 claims as contract claims, statutory claims or claims covered by residual statutes of limitations. *See Griffin v. Pacific Maritime Ass'n,* 478 F.2d 1118, 1119 (9th Cir.) (most clearly applicable statute either contractual, statutory or residual claim statute), *cert. denied,* 414 U.S. 859 (1973); *Macklin v. Spector Freight Sys., Inc.,* 478 F.2d 979, 994 & n.28 (D.C. Cir. 1973) (either residual or contractual period); *Green v. McDonnell Douglas Corp.,* 463 F.2d 337, 340 (8th Cir. 1972) (parties agreed that contractual statute was most analogous); *Waters v. Wisconsin Steel Workers Int'l Harvester Co.,* 427 F.2d 476, 488 (7th Cir.) (approving use of residual statue), *cert. denied sub nom. United Order of American Bricklayers & Stone Masons, Local 21 v. Waters,* 400 U.S. 911 (1970); *United States v. Georgia Power Co.,* 474 F.2d 906, 924 (5th Cir. 1973) (applying residual statute for recovery of wages); *Boudreaux v. Baton Rouge Marine Contracting Co.,* 437 F.2d 1011, 1017 n.16 (5th Cir. 1971) (applying contract statute). All of these claims are the same as, or similar to, claims covered by Pennsylvania's six-year statute of limitations.

> Neither he, nor this court, foresaw the Supreme Court's ruling that all § 1983 cases should be governed by a uniform statute of limitations—that provided by the states for personal injury."

Goodman, 777 F.2d at 118.

The "not clearly foreshadowed" test, which the Third Circuit ignored, is part of the controlling law on retroactivity. This Court itself has twice held that a ruling should be applied nonretroactively *because it resolved a previously undecided issue. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion) (citing *Chevron*); *Lemon v. Kurtzman*, 411 U.S. 192, 206 (1973) (plurality opinion) (citing *Chevron*). In *Northern Pipeline*, this Court refused to give retroactive effect to its ruling with respect to the constitutionality of the Bankruptcy Act of 1978, noting that "[i]t is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III". 458 U.S. at 88.

Thus the Third Circuit erred by ignoring the "not clearly foreshadowed" test. The instant case indisputably satisfies the test and should therefore have been given nonretroactive treatment.

B. The Third Circuit's Approach Would Retard the Purposes of *Wilson* and Section 1981.

First, any retroactive application of *Wilson* would undermine the purposes of both *Wilson* and Section 1981 by denying relief to plaintiffs with otherwise valid Section 1981 claims. One of the purposes of *Wilson* was to "minimize[ ] the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983". 471 U.S. at 279. *Chevron* also looked directly to the interests served by the underlying statute that was interpreted by the new case being applied. *See* 404 U.S. at 107-08. Denying relief under Section 1981 solely because the limitations period had been shortened after the cause of action was commenced would work against

the intent of *Wilson* and Section 1981 to protect federal civil rights. *Chevron* itself stressed the importance of not retroactively barring a claim that already had been litigated for a long time: "[t]o abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress". 404 U.S. at 108.

No plaintiffs should be exposed to the risk that years of expenditure of resources on civil rights litigation will be converted into years of wasted effort by the retroactive application of an unforeseeable decision implementing a technical bar to otherwise valid claims. Requiring litigants to revisit a multiplicity of issues after years of litigation would be the height of unfairness. Such a result would impose an inequitable penalty on good faith attempts to vindicate civil rights violations.

Thus, each of the *Chevron* factors strongly supports nonretroactivity. In contrast, the result below undermines the purposes of both *Wilson* and Section 1981. It denies relief for Section 1981 violations that were timely prosecuted under the law existing when the complaint was filed and that have been litigated extensively thereafter. There is absolutely no basis for applying *Wilson* so as to produce exactly the kind of chaos it sought to eliminate.

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

HAROLD R. TYLER
JAMES ROBERTSON
NORMAN REDLICH
Trustees
WILLIAM L. ROBINSON
JUDITH A. WINSTON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 Eye Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

GROVER G. HANKINS
JOYCE H. KNOX
NATIONAL ASSOCIATION
FOR THE ADVANCEMENT
OF COLORED PEOPLE
4805 Mount Hope Drive
Baltimore, Maryland 21215
(301) 358-8900

ANTONIA HERNANDEZ
E. RICHARD LARSON
THERESA BUSTILLOS
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL
FUND
634 South Spring Street
Los Angeles, California 90014
(213) 629-2512

ROBERT F. MULLEN
Counsel of Record

STACEY E. ELIAS
IVAN F. BLEJEC
BROOKS R. BURDETTE
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
57th Floor
New York, N.Y. 10005
(212) 422-3000

JOAN BERTIN
JOAN GIBBS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

JUDITH L. LICHTMAN
CLAUDIA WITHERS
WOMEN'S LEGAL DEFENSE FUND
2000 P Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 887-0364

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Attorneys for Amici Curiae